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No. 77-1133

In the Supreme Court of the United States

OCTOBER TERM, 1977

JOSEPH MARINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JEROME M. FEIT,
JOHN T. BANNON, JR.,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 562 F. 2d 941.

JURISDICTION

The judgment of the court of appeals (Pet. App. 12-13) was entered on November 10, 1977. A timely petition for rehearing was denied on December 12, 1977 (Pet. App. 14-15). Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including February 10, 1978 (Pet. App. 18), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in allowing the government to reopen its case.

2. Whether the trial court committed plain error in its closing instructions to the jury.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiracy to import marijuana in violation of 21 U.S.C. 952(a) and 963. He was sentenced to imprisonment for two years and to a special parole term of two years. The court of appeals affirmed (Pet. App. 1-11).

The evidence showed that Roy Warren, the captain of the vessel ADVENTURER III, and Fred Williams, a crewman, met with Michael Parks and petitioner in Miami in January 1973 (Tr. 18-19). At that meeting Parks urged Warren to take the ADVENTURER III to Montego Bay, Jamaica, to pick up a cargo of marijuana (Tr. 19-22). At a subsequent meeting on the ADVENTURER III, attended by petitioner, Parks arranged for Warren and Williams to meet petitioner in Montego Bay (Tr. 23-25, 67-68). At this meeting, Warren asked petitioner when the marijuana would be picked up; petitioner said it would be "a few days" (Tr. 27). Petitioner later told Williams that they would meet some fishermen who would take them to a cove where the marijuana would be loaded on board the vessel (Tr. 28). Petitioner also stated that he would get a truck to transport the marijuana to the cove (Tr. 29).

A few days later, Warren, Williams and petitioner sailed out of Montego Bay, met the fishermen and followed them to the cove, where the marijuana was

loaded on the ADVENTURER III (Tr. 31-32). While petitioner was helping load the marijuana on board, he told Williams that the ADVENTURER III should proceed to the Bahamas and there transfer the marijuana onto the fishing boat BIG L. Petitioner also told Williams that Parks would be aboard the BIG L and that the boat's destination was the West Palm Beach, Florida area (Tr. 32-33). After the marijuana had been loaded, the ADVENTURER III set sail for the Bahamas; petitioner returned to the United States (Tr. 34). The ADVENTURER III eventually transferred the marijuana to the BIG L in the Bahamas. Shortly thereafter, the Coast Guard seized the BIG L and and its cargo of marijuana and arrested all on board (Tr. 35). Petitioner was arrested three years later (Pet. App. 4).

ARGUMENT

1. Petitioner contends (Pet. 23-26) that the trial court abused its discretion when it allowed the government to reopen its case and thereafter allegedly allowed the government to introduce substantial evidence without which petitioner claims he would have been acquitted. Petitioner's contention is without substance. It is well established that a trial court may permit the reopening of a case to present omitted evidence, and the trial court has considerable discretion in such matters. *United States* v. *Ard*, 544 F. 2d 225 (C.A. 5); *United States* v. *Bridgefourth*, 538 F. 2d 1251 (C.A. 6); *United States* v. *Young*, 488 F. 2d 1211 (C.A. 8). There is no reason for further review of the exercise of that discretion here.

The district court allowed the government to recall Williams to testify that the original meeting with Parks and petitioner took place on Watson's Island in Miami, as charged in the indictment[1] (Tr. 63-66). As the court of

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[1]The motion to reopen was prompted by a defense motion for a judgment of acquittal on the ground that the government had failed to prove any overt act (Pet. App. 5-6).

appeals noted, after a careful examination of the record, the district court acted within its discretion in allowing the government to recall Williams, because "the omission of proof was, without a doubt, inadvertent, and had to do with an uncontested fact—the exact situs of the meeting between Parks and Williams" (Pet. App. 9). Petitioner now contends (Pet. 26) that Williams "change[d] his entire testimony" when he stated that he had met with petitioner on that occasion. But Williams' original testimony was that petitioner had been present at the meeting (Tr. 17-19); thus there was no inconsistency. Furthermore, petitioner did not object to any of Williams' testimony on recall, and he waived cross-examination (Tr. 67-68), thus substantially undercutting his present claim that Williams' testimony on recall was important.[2]

2. Petitioner challenges the court's jury instructions in two respects. Neither claim has substance.

a. He contends the trial court erred by not instructing the jury that the government must prove that petitioner specifically intended to conspire to import marijuana into the United States (Pet. 16-18). Since petitioner made no objection or request to so charge, this claim is not reviewable unless the court's instruction was plainly in error. Fed. R. Crim. P. 52(b); *Singer* v. *United States*, 380 U.S. 24, 38; *United States* v. *Brown*, 547 F. 2d 1264, 1266 (C.A. 5). It was not.

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[2]There is no conflict between the decision below and *United States* v. *Moehring*, 446 F. 2d 516 (C.A. 10), or *United States* v. *Webb*, 533 F. 2d 391 (C.A. 8). In those cases the government was allowed to reopen its case because it had inadvertently omitted noncontroverted matter essential to the record, and neither case involved reversal of a conviction for improper reopening of the prosecution's case.

The trial court instructed the jury on the four elements necessary to find petitioner guilty of conspiracy to smuggle marijuana into the United States (Tr. 113-114).[3] It carefully explained each of these elements to the jury.[4] Moreover, contrary to petitioner's contention (Pet. 17-18), the trial court did instruct the jury that it must find that petitioner had the specific intent to further the object of the conspiracy before it could find him guilty of that offense:

> [T]here must be proof * * * beyond a reasonable doubt that * * * the [petitioner] knowingly and wilfully participated in the alleged scheme *with the intent to advance its alleged unlawful purpose*.
>
> To act or participate knowingly and wilfully means to act voluntarily and understandingly and with the specific intent to do something which the law forbids * * *. [Tr. 117; emphasis added.]

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[3]"First, it must be proved that the conspiracy described in this indictment was formed and in existence during the time alleged; [second], it must be proved that the defendant knowingly and wilfully became a member of that conspiracy; [third], that while the conspiracy was in progress and while the defendant was a member thereof that one of the then members thereof committed knowingly and wilfully at or about the time alleged at least one of the overt acts charged in this indictment; [fourth], that such overt act, that is one that was thus committed, was committed in furtherance of the illegal object of the alleged conspiracy" (Tr. 113-114).

[4]Since the trial court did instruct the jury on the essential elements of the offense charged, petitioner's reliance on *United States* v. *Bosch*, 505 F. 2d 78 (C.A. 5), is misplaced. In *Bosch*, the defendant's conviction was reversed because the court failed to instruct the jury on the elements of the offense charged. It held that a mere reference to the indictment was insufficient. Petitioner's reliance on *United States* v. *Bryant*, 461 F. 2d 912 (C.A. 6), also is misplaced. In *Bryant* the defendant's conviction was reversed because the court failed to instruct the jury on the elements of the offense charged. The court of appeals noted that it was insufficient merely to read to the jury the statute defining the offense.

The court made it clear that the unlawful purpose of the conspiracy was the knowing and intentional importation of marijuana into the United States (Tr. 115), and the court of appeals properly found these instructions sufficient.

The decision below is not in conflict with *United States* v. *Martinez*, 496 F. 2d 664 (C.A. 5), certiorari denied, 419 U.S. 1051. See Pet. 19-20. In *Martinez*, the defendant's conviction was reversed because the court failed to instruct the jury on the substantive crime of distributing marijuana, one of the objects of the charged conspiracy. As the court of appeals here noted (Pet. App. 11), there was no such defect in the instant case because the jury instructions, considered in their entirety, apprised the jury as to the definitions, character, and nature of the acts of importing marijuana into the United States.

b. Petitioner further alleges (Pet. 20-21) that the trial court erred by including in its instructions admonitions to the jury to use its common sense. He argues that such admonitions negated the presumption of innocence to which he was entitled. Since petitioner did not object to these instructions, his claim must be reviewed under the plain error standard. Fed. R. Crim. P. 52(b); *Singer* v. *United States, supra; United States* v. *Brown, supra.*

The instructions included the following references to common sense:

> Now, how do you determine what is the truth in the case? It is a simple process whereby you consider the testimony of the witnesses who testified before you and you consider these exhibits that have been received in evidence and then you draw such

> inferences of fact as your good common sense tells you this testimony and these exhibits, that is, all of this evidence, supports and justifies. [Tr. 101.]
>
> * * * * *
>
> I am going to tell you something now that is probably as important as anything else I will say to you: In weighing the testimony of the witness and in judging this case and determining what credit and weight will be given to the testimony, each juror should use his or her good common sense. When I use those words "common sense" what I am talking about is the experience and the discretion and the judgment that you have gleaned over the period of your lifetime in dealing with other people in matters of great importance to you.
>
> * * * Was the testimony of the witness trustworthy or not, using those guidelines and most especially your good common sense. [Tr. 107-108.]
>
> * * * * *
>
> * * * [C]onsider all of the evidence that bears on each of these elements and the ultimate issue of the guilt or non-guilt of this defendant and all of these instructions I have given you and, in the exercise of your good common sense, make a determination of whether the defendant is guilty or not guilty * * *. [Tr. 124.]

Petitioner's contention ignores the trial court's unequivocal instruction that petitioner was presumed innocent:

> As I have told you earlier, the law presumes * * * a defendant on trial * * * to be innocent of the crime charged. A defendant although accused begins the trial of a case with what may be referred to as a clean slate * * * and is presumed to be innocent. * * *

> This presumption of innocence alone is sufficient to acquit a defendant * * *.
>
> Since the burden of proof rests on the Government, it never shifts to the defendant. The defendant is under no burden to prove his innocence * * * and this presumption of innocence remains with the defendant as to each and every material allegation in this indictment until that presumption has been met and overcome by evidence beyond a reasonable doubt. [Tr. 101-102.]

As the court of appeals observed (Pet. App. 9), mere remarks about the use of common sense as a valuable tool in the deliberative process do not infect the instruction with plain error. Jurors may act upon matters within their general knowledge (*United States* v. *Ricciardi*, 357 F. 2d 91 (C.A. 2), certiorari denied, 384 U.S. 942), and the trial court's admonitions invited the jury to do no more. Such instructions do not constitute plain error.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JEROME M. FEIT,
JOHN T. BANNON, JR.,
Attorneys.

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